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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

DAVID A. STEBBINS, Plaintiff, v. KARL POLANO et al., Defendants.	CASE NO.: 4:21-cv-04184-JSW **REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF MOTION TO INTERVENE** Judge: Hon. Jeffrey S. White Date: June 3, 2022 Time: 9:00 AM By videoconference Action Filed: June 2, 2021

Pursuant to Rule 201 of the Federal Rules of Evidence, non-parties Alphabet Inc. ("Alphabet") and YouTube, LLC ("YouTube") request that the Court take judicial notice of the attached copy of Plaintiff David Stebbins's application to register his allegedly infringed Accidental Livestream with the United States Copyright Office, which the undersigned counsel obtained from the Copyright Office on April 8, 2022. *See* Exhibit A.

A court "must take judicial notice if a party requests it and the court is supplied with the necessary information." Fed. R. Evid. 201(c)(2). "The court may judicially notice a fact that is not subject to reasonable dispute because it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Courts routinely take judicial notice of matters of public record before administrative agencies, including applications to register works with the Copyright Office. *See, e.g.*, *Lewis v. Activision Blizzard, Inc.*, 2012 U.S. Dist. LEXIS 151739, at *2 n.1 (N.D. Cal. Oct. 22, 2012) (taking "judicial notice of [plaintiff's] applications for copyright registration which are matters of public record and the subject of allegations in the complaint"); *Hyowon Elecs., Inc. v. Erom, Inc.*, 2014 U.S. Dist. LEXIS 190442, at *7 (C.D. Cal. May 15, 2014) ("[Plaintiff's] copyright registration application and the copyright registration are certified copies from the United States Copyright Office, and are matters of public record and the type of documents that the Court may judicially notice under Rule 201(b)(2).").

Alphabet and YouTube request that the Court take judicial notice of the attached application in connection with their accompanying Motion to Intervene. The application is also incorporated by reference and integral to the complaint. *See* Dkt. 55 (SAC) ¶ 24 ("I have registered this accidental livestream with the U.S. Copyright Office."). Alphabet and YouTube contend that the allegedly infringed work is not copyrightable because it lacks creativity and is not a product of human authorship. Although Plaintiff did register the video with the Copyright Office, he admits in his complaint that the video was actually created when his "livestream software turned on of its own accord without me realizing it. It stayed on for nearly two hours before I realized it was on and closed it down. During this accidental livestream, my viewers were able to see me engaging in mundane, daily activities[.]" *Id.* ¶ 22. Plaintiff adds that "the only interesting and memorable part of this otherwise boring and contentless livestream" were "strange noises" that he "did not cause." *Id.* ¶ 23.

The attached application demonstrates that Plaintiff did not disclose any of this information to the Copyright Office. In the application Plaintiff characterizes the video as a "Dramatic Work." He does not explain (among other things) that the "livestream software

turned on of its own accord without [him] realizing it," and he does not disclose that "the only interesting and memorable part" of this otherwise "contentless" video was not caused by him. *Id.* ¶¶ 22-23. This is more than enough to overcome the "presumption of the validity" of Plaintiff's copyright and to "deny the plaintiff's prima facie case of infringement." *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1144-47 (9th Cir. 2003) (citation omitted) (finding copyright invalid notwithstanding its registration with the Copyright Office, because information that was not disclosed in plaintiff's application showed that the work lacked creativity); *see also, e.g.*, *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994) (finding that courts may, even at the pleading stage, rely on facts "contained in materials of which the court may take judicial notice"); *Chavez v. Wash. Mut. Bank*, 2013 U.S. Dist. LEXIS 79239, at *8-9 (N.D. Cal. June 5, 2013) ("[T]he Court need not accept as true allegations contradicted by judicially noticeable facts, and the [c]ourt may look beyond the plaintiff's complaint to matters of public record ….") (cleaned up).

Alphabet and YouTube are also prepared to provide a copy of the Accidental Livestream if requested by the Court. *Savage v. Council on Am.-Islamic Rels., Inc.*, 2008 U.S. Dist. LEXIS 60545, at *6 (N.D. Cal. July 25, 2008) (considering allegedly infringing content referenced in the complaint on a motion for judgment on the pleadings as to fair use) (citing, e.g., *Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1121-22 (N.D. Cal. 2002) (considering television program referenced in, but not attached to, the complaint)); *City of Inglewood v. Teixeira*, 2015 U.S. Dist. LEXIS 114539, at *2-6, *15-17 (C.D. Cal. Aug. 20, 2015) (considering, on a motion to dismiss, alleged YouTube videos that criticized plaintiff even though the videos were not attached to the complaint, and dismissing complaint on grounds that those videos constituted fair use); *Hughes v. Benjamin*, 437 F. Supp. 3d 382, 386 n.1 (S.D.N.Y. 2020) (considering YouTube videos on motion to dismiss on fair use grounds, because those videos had been "incorporated by reference into the Complaint"). If requested, Alphabet and YouTube will follow the Court's direction as to the manner in which the video should be submitted.

Dated: April 20, 2022

Respectfully submitted,

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